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No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal-sized frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government, where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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STATEMENT OF THE CASE

Respondents misrepresent the facts of this case. Their errors include the omission of relevant facts, "facts" that no longer exist, and the creation of "facts" that never existed.

Relevant Facts That Were Ignored: The Courthouses are like museums. Pet. Br. 4. In McCreary, not counting the Foundations Display, there are 284 additional framed historical documents that adorn (some might think clutter) the walls, so that there is little remaining space. *See* Am. Liberties Inst., Br. 2-28, *McCreary County v. ACLU*, No. 03-1693. Some frames include a Veterans Day gift, a recently donated flag that flew ~~in~~ Afghanistan, a plaque honoring a local Medal of Honor winner, pictures of the courthouse staff from the early 1900s, a Kentucky Governor from the county, other civil servants, the naming of a memorial road, the original 1912 courthouse and the rebuilt courthouse following the 1930 and 1950 fires. *Id.* at 2, 5-13. Documents commemorate President Roosevelt and Social Security, the surrender of Germany and Japan, the Civil War, Desert Storm, and American history. A complete list would consume this brief.

As part of its 200th anniversary in 1999, Pulaski added numerous documents. A visitor is introduced to Casimir Pulaski, who joined the Revolution because he "opposed tyranny," *id.* at A1, sees past courthouses, plaques regarding Civil War battles, early modes of travel, local artists and playwrights, two Governors and a U.S. Senator and Representative from the county, a Medal of Honor winner, the meaning of the county name, the origins of Kentucky's largest lake, and a history of local government. *Id.* at A1-10. The walls depict an array of events regarding the history of the counties, the state and the Nation. *Id.* at A12-22.

Alleged "Facts" That No Longer Exist: Respondents focus

on the first displays, but admit that Petitioners "voluntarily granted the plaintiffs relief from those displays." JA 3, #10 at 2; 29, #11 at 2. They then focus on the second displays, but acknowledge that Petitioners do not "quarrel with the conclusion that the second displays violated the Establishment Clause," that they "make no effort to defend those displays," and "they strive to distance themselves from their earlier displays." Resp. Br. 23-24. Respondents are right that "[n]o one here argues that those displays were constitutional." *Id.* But they attempt for the first time in this litigation to pin a resolution regarding the second display on the Foundations Display.[1] Petitioners voluntarily accepted the preliminary ruling on the second display. That display, and any resolution regarding it, is dead, buried and abandoned. That order is final. Petitioners closed that chapter.

Alleged "Facts" That Never Existed: There are many alleged "facts" in Respondents' brief that have no basis, but only a few will be cited here due to space limitations.[2] The contention that the "sole legislative authorization" for the Foundations Display is a 1999 resolution regarding the second display is wrong. Resp. Br. 4. There was no resolution for the first display and none for the Foundations Display because none was needed. Resolutions are not necessary to post documents. The resolution on the second display was for that display only. When it was enjoined and not appealed, that display and its resolution were placed in the same tomb.

Petitioners did not "capitalize the word 'Lord'" in the Decalogue. Resp. Br. 30 n.18. They did not create the

[1] Respondents never referred to a resolution on the second display. There is no mention of it during the March 2001hearing on the Foundations Display (JA 19, #71), nor in any pleading or in the lowers courts.

[2] Many relate to the prior displays which are not before this Court.

Displays. English translations capitalize this Hebrew word. In the Magna Carta several words are also capitalized, including "God," but that is because capitalization appears in the original document. PA 199a, 200a, 210a, 212a.[3] Finally, there is no evidence regarding the "tone and content of public discourse," "letters to local newspapers," "proliferation of 'Keep the Ten Commandments' yard signs," or "statements of public officials," (Resp. Br. 42), nor did the District Court ever refer to such alleged information.

ARGUMENT

I. THE FOUNDATIONS DISPLAY WITH THE TEN COMMANDMENTS PASSES THE *LEMON* TEST.

The Sixth Circuit's "theory of indelible, unconstitutional taint not only offends common sense" (PA 83a, 41-42a), it is contrary to *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), as applied to courthouses, where the Decalogue is a widely recognized symbol of law. Such a twisted emanation of *Lemon* is unworkable, contrary to precedent, and unsound, especially where public officials unversed in this Court's divided opinions are tasked with managing business while navigating the shoals of the Establishment Clause.

A. The Display Satisfies The Purpose Prong.

The purpose prong accords great "deference" to any

[3] Whether the Display was hastily assembled as Respondents claim is unknown. Resp. Br. 31 n.19. The Foundations Display in each Courthouse was donated. Petitioners did not create them.

"articulation of a secular purpose" unless it is a fraud, a hoax, or an intentional deception, i.e., a sham. Pet. Br. 8-9. In most cases, this Court has "effortlessly discovered a secular purpose."[4] The five cases decided under the purpose prong all involved public schools,[5] where this Court has applied scrutiny at a level inversely related to the age of the students, noting that adults are "presumably not readily susceptible to 'religious indoctrination,' or peer pressure."[6] This Court has never struck down a governmental practice involving *adults* under the purpose prong. To do so here regarding a Display about law, in Courthouses with a museum-like setting, where adults rather than juveniles are present, would require an extreme *extension* of *Lemon*. The Sixth Circuit did just that by deciding this case solely under the purpose prong. If there is no agreement on anything else, there must be consensus to reverse this *unprecedented* application of *Lemon*.

Although there is no controlling authority on whether courthouses can display the Decalogue, the District Court characterized the mere posting of the first display as "defiance [that] imprinted [Petitioners'] purpose, from the beginning, with an unconstitutional taint." PA 41a. The Sixth Circuit erroneously stated that such finding was consistent with this Court's precedent. *Id.* "A finding of religious purpose is

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[4] *Edwards v. Aguillard*, 482 U.S. 578, 613 (1987)(Scalia, J., dissenting). "[I]t is entirely proper to presume that [public] officials will act in good faith." *Mitchell v. Helms*, 530 U.S. 793, 863-64 (2000)(O'Connor, J., concurring).

[5] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards*, 482 U.S. at 578; *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[6] *Marsh v Chambers*, 463 U.S. 783, 792 (1983)(citation omitted); *see also Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981); *Edwards*, 482 U.S. at 584 n.5.

militated by the blatantly religious content of the displays. The displays do not present a 'passive symbol' of religion like a creche... . Instead, the Ten Commandments are an active symbol of religion ... ." *Id.* at 35a. The court ignored *Lynch v. Donnelly*, 465 U.S. 668 (1984), and overlooked *Allegheny*, where the menorah celebrates a "miracle," and the Talmud prescribes the lamp lighting ceremony as "a religious deed or commandment." 492 U.S. at 583-84. Yet, it was deemed a passive symbol. Pet. Br. 12 n.9. That one passive symbol of law should "taint" future actions or convert a secular display into a religious one is absurd. The "theory of indelible, unconstitutional taint" would have doomed the menorah in *Allegheny*, but "not one Justice took the position that the officials' miscalculation regarding the [creche at] the Grand Staircase tainted the decision concerning the [menorah at] the City-County Building." *ACLU v. Schundler*, 168 F.3d 92, 105 n.12 (3d Cir. 1999)(permitting modification of a display). Moreover, unlike the infrequent and gratuitous appearances of creches and menorahs on public property, the universally recognized symbol of law is at home in a courthouse. The Decalogue is unlike almost any other acknowledgment. When displayed in a courthouse, it is not a religious statement any more than is the National Motto on our currency. While this Court has ornate carvings, the Courthouses have inexpensive, framed documents. Although on different scales of economy, the two settings are functionally equivalent.

The first display was a single copy of the Decalogue placed in the midst of a few hundred existing documents. When sued, Petitioners were given a second display. The legal advice they received was that they should switch rather than fight. Admittedly, this advice was questionable, but arguably understandable in light of no clear legal guidance. When the second display was enjoined, Petitioners did not

challenge the ruling. The Foundations Display was then donated. Petitioners terminated their counsel and sought new counsel. This Display was also enjoined when the District Court created a "one strike, you're out" rule. The first display would be what Justice Stevens described as "equivocal," the second as having an impermissible focus on religion, and the Foundations Display as showing respect for law. *See County of Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part, dissenting in part). Petitioners stepped on a landmine with the second display, but surely they must be allowed to correct their steps, especially considering the state of the law.

As did the lower courts, Respondents focus exclusively on the Decalogue. Yet, *Lynch* and *Allegheny* inform us that the *entire* context matters. Respondents concede that "all but one of these documents are perfectly legitimate and serve a perfectly valid secular function." JA 19, #71 at 18. They say "[t]here is absolutely nothing wrong with posting every one of these documents, but for the one religious document." *Id.* They argue that these "perfectly legitimate" documents do not "sufficiently secularize the Ten Commandments." JA 10, #36 at 58. The question is not whether the other documents secularize the Decalogue. They do not, any more than the Decalogue makes the Declaration sacred. The real question is the purpose of the *entire* Display. The Foundations Document answers this question, stating the "display contains documents that played a significant role in the foundation of our system of law and government." PA 179a. The undisputed testimony stated the Display "is educational in nature, and is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States." JA 57, 62; Pet. Cert. 23 n.9.

Respondents said that while there is no "direct line" to the Declaration and political life, the Decalogue "may have had

an influence, ... a big influence." JA 19, #71 at 20. Respondents and their amici admit that some Colonial laws "directly paralleled the Ten Commandments" (Resp. Br. 35), and that at least the Commandments regarding murder, theft and perjury are a significant part of American law.[7] Their amici admit it "is equally indisputable that the precepts contained in some of the Commandments have been inspirational in the development of the Western legal tradition." Legal Historians, Br. 2-3. Professor Green, who authored the Legal Historians' brief, stated elsewhere: "It is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition... . Few people, if any, would dispute that the Ten Commandments ... inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is part."[8] That the "Ten

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[7] Resp. Br. 41; *see also* Baptist Joint Comm., Br. 16, *McCreary*, No. 03-1693; Baptist Joint Comm., Br. 20, *Van Orden v. Perry*, No. 03-1500; Legal Historians, Br. 3, *McCreary*, No. 03-1693; Council for Sec. Humanism, Br. 19, *McCreary*, No. 03-1693 (some colonies incorporated "portions of the Decalogue"). William Blackstone said that with respect to crimes like murder, theft, and perjury, the legislature "acts only ... in subordination to the great lawgiver, transcribing and publishing his precepts." 1 *Commentaries on the Laws of England* 54 (1765). Respondents and their amici ignore the influence of the Sabbath command on Sunday laws, which "were motivated by religious forces" derived from the Decalogue. *McGowan v. Maryland*, 366 U.S. 420, 431 (1961). They also omit adultery. *Id.* at 462 (Frankfurter, J., concurring).

[8] Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & Rel. 525 (1999-2000); *see also* Legal Historians, Br. 28 ("the Ten Commandments have influenced some of our notions of right and wrong"); Resp. Br. 37 n.23. "That the Ten Commandments are, in some sense, a portion of a proto-legal code is not in dispute." Council for Sec. Humanism, Br. 9; Anti-Defamation League, Br. 26, *McCreary*, No. 03-1693 ("Undoubtedly, the

Commandments [have] been indirectly inspirational in the formation of legal norms ... is a relatively noncontroversial proposition." Green, *The Fount of Everything Just and Right*, 14 J.L. & Rel. at 530. Green recognizes the influence of the Decalogue in Europe, the New England colonies, and from the early 1800s onward in the "influential" writings of Blackstone, Joseph Story, the "widely-read" writings of David Hoffman, and court decisions. *Id.* at 531-43, 549-58.[9]

King Alfred's book of Dooms, the precursor to the common law which distilled the Anglo-Saxon laws, begins with the Ten Commandments.[10] The Decalogue did influence American law.[11] The Declaration does not say human rights originate from the people below, but that they are "endowed by their Creator" above. The Decalogue toc evinces rights to life, liberty and the pursuit of happiness in the commands regarding taking human life, theft, coveting, spousal and family relationships, and perjury. Daniel Webster echoed the

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Decalogue is of historical importance...").

[9] Green states that Story and Hoffman do not quote the Decalogue, but "[t]heir writings suggest they may have agreed with the proposition" that "the Ten Commandments serves as the foundation of American law." *Id.* at 553. Green also says that this Court's architecture portrays "the Ten Commandments ... as a primary source of American law." *Id.* at 525.

[10] *See id.* at 531; Harold J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* at 65 (1983).

[11] *See* Am. Ctr. for Law and Justice ("ACLJ"), Br. 4-9, *Van Orden*, No. 03-1500; Berman, *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. Cal. L. Rev. 1573, 1618-30 (1989)(the Decalogue was seen as "the basic source and summary of natural law"); Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale L.J. 1651, 1661-62, 1709-10 (1994); Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 Emory L.J. 777, 789 (1986); Daniel J. Boorstin, *The Americans: The Colonial Experience* at 18-19, 28 (1958)(Decalogue's influence during the Colonial period).

views of many when he argued to this Court that we "hold life, liberty, and property in this country upon a system of oaths," the basis of which is belief in God and the perjury Commandment.[12] Blackstone wrote of "the law of nature ... dictated by God himself." 1 *Commentaries* 41. "Jefferson, too, though against organized religion, believed firmly in 'nature's God,' 'the Creator,' the 'Supreme Judge of the World' – all terms found in the Declaration of Independence." Berman, *Religion and Law*, 35 Emory L.J. at 786.

Respondents and their amici admit that the principles contained in the Decalogue "informed our notions of right and wrong." These principles did provide the moral background of the Declaration and our legal tradition. Jefferson believed that all religions shared a "common morality which is essential to the welfare of society [and that] America needed religion to give it the necessary inner strength to survive." *Id.* "[T]o the extent that the Ten Commandments established ethical and moral principles, they were expressions of universal standards of behavior common to all western societies... . [T]hese moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed part of the moral background for the adoption of the national

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[12] *See* Daniel Webster, "The Christian Ministry and the Religious Instruction of the Young," in 6 *The Works of Daniel Webster* 168, 174 (19th ed. 1885). The case was *Vidal v. Girard's Executors*, 43 U.S. 127 (1844). Washington said, "Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice?" George Washington, Farewell Address (Sept. 19, 1796), in 35 *The Writings of George Washington* 214 (John C. Fitzgerald ed., 1940).

constitution."[13] The Commandments are a recognizable expression of these moral principles. Thomas Hobbes and John Locke used them for their moral significance, and many jurists believed that law should encapsulate moral law, particularly as set forth in the Decalogue.[14] The Founders were familiar with *The New England Primer*, "the most widely read book in America" between 1700 and 1850, that says the "moral law is summarily comprehended in the Ten Commandments." R.F. Butts & L.A. Cremin, *A History of Education in American Culture* 69 (1953).

Although the Foundations Document does not claim that the Decalogue inspired Jefferson or the Declaration, the significance of Moses and the Decalogue would not have been lost on the Founders.[15] The Sixth Circuit's contention that there is no "analytical" link between the Decalogue and the other documents lacks merit. The link includes (1) some

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[13] *State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013, 1024 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996). Alexis De Tocqueville wrote that although there are many sects in America, they "all preach the same morality in the name of God." 1 *Democracy in America*, pt. 1, ch. 9, p. 152 (1835)(reprint 1990).

[14] *See* Paul Grimely Kuntz, *The Ten Commandments on School Room Walls?*, 9 U. Fla. J.L. & Pub. Policy 1, 11-13 (1997); John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law*, 10 J.L. & Religion 433, 451 (1993-94); Berman, *Origins*, 103 Yale L.J. at 1661-62; Thomas Hobbes, *Leviathan*: Part III, ch. 42 (1651)(reprint 1958).

[15] Benjamin Franklin, Jefferson and John Adams were appointed on the afternoon of July 4, 1776, to create the Great Seal of the United States. Jefferson and Franklin proposed a depiction of Moses leading Israel in the Exodus. *See* James H. Hutson, *Religion and the Founding of the American Republic* 50-51 (Library of Congress, Washington, D.C., 1998). The proposed motto was "Rebellion to Tyrants is Obedience to God." During his Second Inaugural Address, Jefferson again evoked the Exodus event. *See A Compilation of the Messages and Papers of the President, 1789-1897*, 10 vols. (U.S. Government Printing Office, Washington, D.C.).

documents that played a role in the development of American law, (2) a universally recognized legal and moral code, and (3) a theme of liberty expressed by the rule of law.[16] The first two have already been addressed. The latter is evident by the parallels drawn between the Revolution and the Exodus. The Exodus began with "Let my people go" and reached its apex in the Commandments on Mt. Sinai. Jefferson and Franklin connected this theme with the Revolution. The Decalogue evokes notions of liberty because of the Exodus and the rule of law. When the law is king, there is little room for tyranny. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963).

Although the Display has secular themes of law, liberty, morality and government, the degree of an "analytical" link required by the Sixth Circuit finds no precedent. The "majority seems to envision a display that contains a recounting of the history of the nation's founding, a summary of American constitutional law and history, ... and I suppose, at least as much evidence as was presented to [the] court in the official record of more than 200 pages." PA 77a. In *Lynch*, this Court considered the context of a Christmas display. 465 U.S. at 679. Some symbols celebrated the holiday, but characters such as a clown, a dancing elephant, a robot, a teddy bear and a "talking wishing well" seemed disjointed, having no such connection. *Id.* at 671; *Allegheny*, 492 U.S. at 596, 598 ("whatever a 'talking' wishing well may be, it obviously was a center of attention separate from the

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[16] The "Trylon of Liberty" with the Decalogue in Hebrew is depicted outside the E. Barrett Prettyman Federal Courthouse in Washington, D.C.

creche"). That the display had a general but disjointed theme, or that it included a sectarian symbol, did not concern the Court.[17] "Of course the creche is identified with one religious faith," *Lynch*, 465 U.S. at 685, as the "chief symbol" of Christianity. *Id.* at 708 (Brennan, J., dissenting). Although it was "in a central and highly visible location," *id.* at 706, and "not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display – as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692 (O'Connor, J., concurring). "It would be ironic ... if the inclusion of a single [religious] symbol" acknowledged by "the Western World" as having a role in the development of law, "and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so 'taint' the [Foundations Display] as to render it violative of the Establishment Clause." *Id.* at 686. "To forbid this one passive symbol ... would be a stilted over-reaction contrary to our history and to [this Court's] holdings." *Id.*[18]

The importance of context is further illuminated in *Allegheny*. There the Court struck down the creche but upheld the menorah. The creche stood alone, but the 18-foot menorah was near a Christmas tree. Both are religious symbols. 492 U.S. at 580-81, 582, 586, 620. The failure to incorporate the creche with the secular holiday did not taint the *simultaneous* display of the menorah, any more than the *prior* displays

[17] The *Lynch* display included Jesus, Mary, Joseph, angels, shepherds, kings, and a church. 465 U.S. at 671; *Allegheny*, 492 U.S. at 596.

[18] Respondents admit that religious statements in the other historical documents "do not ... convert [them] into religious ones," but incorrectly allege that the Decalogue taints the entire Display. Resp. Br. 29 n.17; JA 10, #36 at 60-61, 64, 65, 70.

should taint the Foundations Display. The menorah and creche displays were judged independently. The creche alone presented only a religious message, but the "overall display" of the menorah did not. The display celebrated both the holiday season (Christmas and Hanukkah) and liberty. The menorah and the Christmas tree did not neatly fit with the theme of liberty or "with this Nation's legacy of freedom," but the multiple themes allowed "an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise." *Id.* at 619. A display can have more than one theme. Respondents contend that the Display contains one religious document unconnected with liberty. Petitioners contend otherwise, but the Court need not settle this matter. Multiple themes favor the secular purpose of the Display. The Display has the express theme of law, and at least secondary themes of liberty, morality and government. The Decalogue fits all these themes. The tightness of that fit is not the issue. Themes of law, liberty, morality and government are clearly secular. Like the menorah, the Decalogue is religious, but the "message is not exclusively religious." *Id.* at 613. But, even if it were exclusively religious like a creche, that does not affect the purpose in this context where the overall Display has undisputed secular themes. Hanukkah need not be characterized as a secular holiday, or the menorah as having a secular dimension, to conclude that the display "does not convey a message of endorsement of Judaism or of religion in general." *Id.* at 634 (O'Connor, J., concurring). This conclusion "does not depend on whether or not the city [could have used] 'a more secular alternative symbol.'" *Id.* at 636. Requiring that the government use a "'more secular alternative' [if] available is too blunt an instrument for Establishment Clause analysis." *Id.*

The argument that some parse the Ten Commandments

differently and the mere display violates *Larson v. Valente*, 456 U.S. 228 (1982), has been repudiated.[19] The *Larson* argument was rejected in *Lynch*, where the creche was in context with secular symbols. 465 U.S. at 687 n.13. In *Allegheny*, where the creche stood alone, *Larson* was mentioned, but where the menorah stood in context like the creche in *Lynch*, it was rejected. *Allegheny*, 492 U.S. at 605, 609, 618 n.68. Like the creche in *Lynch* and the menorah in *Allegheny*, the Decalogue is not presented for its religious or doctrinal import, any more than are the Hebrew-inscribed tablets in this Court. The Decalogue must not be severed from its context, nor must the secular aspects be severed from the religious, because it is a "unified whole." Baptist Joint Comm., Br. 9, *Van Orden*. Accepting the argument that any version of the Decalogue dooms the Display would mean that the Bible could never be taught due to its many translations. This Court has never suggested such an extreme application of the Establishment Clause.[20]

Determining the intended message is the only question under the purpose prong. That question must consider the entire context, not one micro-portion. The Display and the testimony state that the purpose is about law and government. Deference should be given to this stated purpose. Although Respondents argue this purpose was a sham, they were less certain in the District Court. "I think it would be a terrible mistake," they told the court, "to have identical displays in different counties, one of which is constitutional, one of

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[19] Christmas engenders more theological debate than the Decalogue, but such disputes become irrelevant in context. *See Allegheny*, 492 U.S. at 579 n.2; *Lynch*, 465 U.S. at 711-12 (Brennan, J., dissenting).

[20] *See Stone*, 449 U.S. at 42; *Schempp*, 374 U.S. at 225. Most know about Bible translations, but are clueless about Decalogue variations.

which is unconstitutional, solely because of bad purpose." JA 19, #71 at 25. "I don't think the court would be wise to rest its decision exclusively on sham purpose." *Id.* at 26. They conceded that the other documents "are perfectly legitimate and serve a perfectly valid secular purpose," they "are not religious documents," they don't "focus on religion," and even that the Ten Commandments "can play a role in the development of modern law and American politics. We don't dispute that." *Id.* at 18, 31, 87. Like the Sixth Circuit, they argue that the other documents were "unrelated" to the Decalogue. *Id.* at 31. But conceding, as they must, that the Decalogue plays a role in "the development of modern law and American politics," that the other documents also play such a role and that they "serve a perfectly valid secular purpose," makes the sham purpose argument a sham itself.

Before this Court is a Display about law contained in equal-sized frames. The District Judge observed, "the newly posted display differs, in my opinion, fundamentally from the other one." *Id.* at 4. The Displays appear "secular in their final version... ." Am. Humanist Assoc., Br. 6-7, *McCreary*, No. 03-1693. The expressed purpose is not an afterthought appended to a prior action. The purpose came into existence with the Display itself. The Display is fundamentally different than any prior display. Petitioners accepted the preliminary ruling on the second display. That display is dead and buried. Unlike *Santa Fe*, where the policy *on its face* provided for prayer, and where it effected no change (Pet. Br. 15), the Display is substantially different. To accept the "theory of indelible, unconstitutional taint" would mean that Petitioners could not even hire the ACLU to replicate this Court's East Pediment (where the Decalogue is central), or the Decalogue in Hebrew text on the south frieze. The Foundations Display does not emphasize the Decalogue. PA 35a. It confirms the

stated purpose. It is surrounded by a few hundred displays. This case presents an even easier question than the Decalogue standing alone. Here it is part of a larger Display on law; the setting is a courthouse; the viewers are adults, not juveniles; and the passerby is not led in prayer. The context does not celebrate religion as religion. The purpose is to educate about law. The Display matches the purpose. That purpose is not a sham. On this point alone, this Court should reverse.

B. The Display Satisfies The Effects Prong.

A reasonable observer viewing the entire context sees the title ("Foundations of American Law and Government"), the stated purpose, the equal-sized frames, the Decalogue as 1/10th of a secular Display about law, a hallway filled with scores of other documents, and is aware of the history and ubiquity of the Decalogue. The observer would know that the secular legal documents in the Display influenced the law, that the laws of murder, theft and adultery parallel the Decalogue, and that oaths are based on belief in God and the perjury Commandment.[21] An observer knows the numerous Sunday laws originated from the Sabbath Commandment.[22] This observer would recognize the Decalogue as a widely accepted symbol of law. Our observer would not be amazed that the Decalogue is *the* central feature on this Court's East Pediment, or that Moses holds tablets containing the *only written* words *inside* this chamber inscribed with unpointed

[21] Oaths traditionally require placing the right hand on the Bible and swearing "So help me God." *See also* WallBuilders, Br. 23-24, *McCreary*, No. 03-1693.

[22] *See McGowan*, 366 U.S. at 551 (Frankfurter, J., concurring)(Sunday laws in 50 states). *See also Strand Amusement Co. v. Kentucky*, 43 S.W.2d 321, 322 (Ky. 1931)(origin of Kentucky's Sunday law is the Decalogue).

Hebrew characters (רצח [kill], נאף [adultery], גנב [steal], ענה [testify], חמד [covet]), App. 1a, or that the Decalogue stands between the entrance of the National Archives and the Declaration and Constitution. This obvious ubiquity in the Nation's Capital is because the Commandments have played a significant a role in the development of our legal system.[23] Since 1872, Richmond County, Georgia, has used the Decalogue in its seal so that the "illiterate" could recognize legal documents, because "in addition to being a religious symbol, [it is] a secular symbol for the rule of law." *King v. Richmond County*, 331 F.3d 1271, 1277 (11th Cir. 2003). Even the Ninth Circuit has had the Decalogue in its seal for at least 100 years (www.ca9.uscourts.gov).[24]

The observer will know that Petitioners accepted the preliminary ruling on the second display, and that the Foundations Display "differs ... fundamentally" from the past. JA 19, #71 at 4. The unintended consequence of the past has served "to educate everyone" regarding the line between acknowledgment and establishment. *Id.* at 44. The observer knows that church-state law is confusing, and that county officials unversed in the complexities of this Court's opinions have tried their best to follow the ever-bending Establishment Clause line. The past has not tainted the observer's viewpoint; rather, it serves to clarify that constitutional vision.

In addition to history and the universally recognized symbol of law, the observer is also familiar with common slogans, like "The Ten Commandments of Golf." *See, e.g.*,

[23] *See* Pet. Br. 11 n. 8; United States, Br. 8 n.2, *McCreary*, No. 03-1693; WallBuilders, Br. 3-25.

[24] *See also Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004)(plaque on courthouse wall since 1918); *Freethought Soc'y v. Chester County*, 334 F.3d 247, 249 (3d Cir. 2003)(on courthouse wall since 1920). The Decalogue has been part of this Court since 1935.

ACLJ, Br. 20-21, App. C. The observer is familiar with "The Ten Commandments" movie, and may think of Moses when seeing Charlton Heston. Judicial opinions, references by the Executive, and Congressional resolutions highlight the Decalogue's ubiquity. The "Ten Commandments are so familiar and, ostensibly, uncontroversial." Anti-Defamation League, Br. 6. They are familiar "to most inhabitants of our Nation... ." *Id.* at 26. Any school kid would be impressed by this ubiquity after a day tour of the Capital. No wonder the twin tablets have become synonymous with law. *See* Pet. Br. 29 n.46. Our observer will not see the Display as a debate or think that Petitioners have taken sides. Could more documents be added? Sure, but the fact that Kwanzaa did not appear in *Lynch* or *Allegheny* is of no more constitutional significance than Hammurabi being absent here. Might some think the "Star-Spangled Banner" is out of place? Perhaps, but no more than a "talking wishing well" in *Lynch*.

The Decalogue is a unique symbol that speaks of law and morality, and which has influenced our common vernacular. The "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," 465 U.S. at 674, helps the observer to view the Display as a tolerable acknowledgment. A ruling in favor of Petitioners does not open the door for displaying every kind of religious imagery. Embedded deep in our Nation's history and our common practices, the Decalogue is in a category with few peers. As a widely recognized symbol of law, it does not appear odd, out of place or jolting in the Display. Scurrying through the Courthouse for an occasional, perhaps even rare, visit, our observer will not feel like an outsider. Political standing is not affected. Religion has not become relevant because of the Decalogue, any more than the Magna Carta favors the British. Certainly,

this busy citizen was not coerced to participate in a religious activity. Our observer will surely not find endorsement here. The Display poses no threat. To eradicate the Decalogue from the Display "would sever ties to a history that sustains this Nation even today." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2322 (2004)(O'Connor, J., concurring).

II. AN ACKNOWLEDGMENT OF RELIGION IS NOT AN ESTABLISHMENT OF RELIGION.

Petitioners assert that the *Lemon* test should be overruled or at least modified. *See* Pet. Br. 34-39. Respondents do not defend *Lemon*.[25] Petitioners' proposed test would find an acknowledgment if the activity (1) comports with history and ubiquity, (2) does not coerce participation in a religious exercise or activity, and (3) does not discriminate among sects based upon religious character alone.[26]

The coercive component makes the "absence of worship

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[25] *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), counsel against a rebuttable presumption. At any rate, the context of law here, like a public forum, rebuts any presumption concerning the Decalogue. *See Capitol Sq. Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995)(O'Connor, J., concurring in part).

[26] This test combines the "absence of worship or prayer" in *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2324-25 (2004)(O'Connor, J., concurring), with coercion, and clarifies that the "absence of reference to a particular religion" is understood as in *Lynch* and *Allegheny*. Acknowledgments do not violate *Larson v. Valente*, 456 U.S. 228 (1982). This test eliminates the "minimal religious content" component in *Newdow*, since it does not fit garden variety display cases. However, when applied to a universally recognized symbol of law like the Decalogue, the ceremonial nature of the symbol makes the several religious words inconsequential as an Establishment Clause matter. Respondents admitted below that text is permissible. JA 19, #71 at 29, 30.

or prayer" element in *Newdow* manageable, by prohibiting government from "compelling or coercing participation or attendance at a religious activity, requiring religious oaths, or delegating government power to religious groups." *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part, dissenting in part). "Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character." *Newdow*, 124 S.Ct. at 2327 (O'Connor, J., concurring).

The Decalogue in the East Pediment (tablets) and the south frieze (text) of this Court are acknowledgments. Whether displayed as tablets or engraved Hebrew text, they comport with history and ubiquity, do not coerce and do not favor one sect. They appear in the context of a court in a display on law and government. The same is true for the Decalogue on the door to this Court's chambers (Roman numerals). The Decalogue is a universal symbol of law and stands in a category with few peers. When displayed in a court setting, that setting itself gives the context of law.

Whether using the above test, Justice O'Connor's four-part test, or past precedent, the Foundations Display with the Decalogue is a tolerable acknowledgment of religion.

CONCLUSION

This Court should reverse the unprecedented application of *Lemon* and uphold the Foundations Display.

Respectfully Submitted,

Mathew D. Staver

APPENDIX

Moses with the Ten Commandments, U.S. Supreme Court Courtroom, *available at*, http://www.supremecourtus.gov/about/north&southwalls.pdf